

LAW OF WAR

Subcourse Number MP1023

EDITION C

United States Army Military Police School
Fort McClellan, Alabama 36205-5030

4 Credit Hours

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SUBCOURSE OVERVIEW

We designed this subcourse to teach you about the law of armed conflict, the principles and rules involved and the benefits of compliance. You will be able to identify conduct which violates the law of war as well as common sense regarding the conduct of hostilities and the treatment of prisoners of war and other noncombatants. You will be able to adhere to and direct adherence to the law of war governing rules of engagement; use of weapons, ammunition, and tactics; treachery (that is holding the enemy's law of war compliance/ noncompliance against him); treatment of captives and detainees; protection of civilians; the rights and obligations of prisoners of war; the prevention of criminal undiscipline; and the investigation and reporting of criminal undiscipline.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronoun is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE:

ACTION: Apply the law of war.

CONDITION: You will have this subcourse.

STANDARD: To demonstrate competency of this task, you must achieve a minimum score of 70 percent on the subcourse examination.

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LESSON

APPLICATION OF THE LAW OF WAR

OVERVIEW

LESSON DESCRIPTION:

In this lesson you will learn the principles of war as defined by the Hague Rules and Geneva Conventions; categories of protected persons; and application of the law of war.

TERMINAL LEARNING OBJECTIVE:

ACTION: Apply the law of war.

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REFERENCES The material contained in this lesson was derived from the following publications:
:
Hague Rules and Geneva Conventions; FM 27-10.

INTRODUCTION

In March 1836, General Santa Anna took his Army northward into Mexico's northernmost province, Texas. He intended to put down an insurgency and restore peace. At San Antonio, the Mexican Army did battle with a much smaller force of insurgents, holed up in a reinforced mission, the Alamo. The insurgents were under the command of Colonel William Barrett Travis and included such colorful personalities as Jim Bowie and former Congressman Davy Crockett. The battle was fierce and lasted several days. When the Mexican Soldiers finally breached the defenses, they were frenzied; many were unable to stop firing and bayoneting, long after their victims died.

It is now apparent that several of the Alamo's defenders were captured. Their captivity was of short duration, however, as they were executed by saber and bayonet. This action was consistent with Santa Anna's orders that no prisoners be taken. The red flag of "no mercy" had been flown from the bell tower of San Fernando Church. The Mexican Army band had played Deguello, the ancient Moorish battle march, somber and fierce, with the Moorish menace of brutality. Deguello had been Santa Anna's signature for years. It was especially appropriate at the Alamo, for the Spanish had first named the melody after the verb degolar—to slit the throat.

PART A - Reasons for Compliance with the Law of War.

1. A central theme underlying compliance with the law of war is that, at all times, do what is right and reasonable under current circumstances. War crimes are not only wrong, they are counterproductive and illegal. Whenever behavior in war goes beyond what is reasonable under the circumstance, we find ourselves in a conundrum that may win us the battle but lose us the war. From historical experiences such as the siege of the Alamo, we learn that senseless killing or maiming of Soldiers and/or civilians who have been captured or

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surrendered only serves to bring discredit and shame upon prevailing military might. Additionally, such acts send a wrong message to the rest of the world, that we will use barbaric tactics of mistreatment on any detainees that are captured or surrender. This would well induce many to fight to the death rather than fall into our hands.

2. Compliance with the Law of War is Morally Right. War crimes are illegal. As United States (U.S.) Soldiers, we are legally bound to comply with the law of war. As Soldiers and leaders in the free world, we must not only win the physical wars and free the oppressed but we must also win the hearts and minds of both the enemy Soldiers and civilians. Additionally, and most importantly, we must live with our own conscience when the war is over.

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3. The commitment of war crimes is counterproductive to the overall mission of the military. In essence, war crimes stiffen adversarial resistance. Historical analysis of wars and battles has proven the need for laws that govern what can and cannot be done in war. As stated above, what is done or not done during a conflict or in the heat of battle can set the foundation for a limited or protracted war (with little or major resistance) [see examples below]:

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a. In the Battle of the Bulge (December 1944, World War II). Allied forces were being pushed back toward the English Channel. Rather than afford the resources and manpower required to detain captured prisoners, German SS Forces slaughtered their American captives near Malmedy, France. News of these massacres spread quickly and through German actions helped to stiffen the resolve of American forces over succeeding days. Finally, at Bastogne, the German advance was halted and the momentum swung back to Allied forces.

b. During World War II in the South Pacific, Japanese soldiers fought not only for the Emperor and individual honor, they fought to avoid capture at all costs. Indoctrination had taught them that the Americans would badly mistreat their captives. As a result, the majority of Japanese soldiers would fight like demons and not surrender. It was this ingrained belief that resulted in countless American casualties. Many Japanese deaths or injuries occurred during post-battle mop-up operations as desperate Japanese soldiers fought beyond reason rather than surrender to perceived acts of torture. Those few that survived and evaded capture, held onto this belief long after they were told it was not true—so seated was their belief.

4. How can our actions affect such indoctrination? Indoctrination is easily confirmed. A Soldier led to believe that brutality follows surrender will have that belief reinforced by the viewing of a single atrocity. It takes much more to dispel such views, but, incrementally, seeds of doubt can be planted. In this example, if the adversary sees that we do not mutilate bodies, this fact may eventually help overcome the indoctrination. Every enemy soldier who surrenders and becomes a noncombatant decreases the enemy's combat power. Some American Soldier's chances of survival are thereby improved. One of those Soldiers could be you.

5. War crimes deprive us of home front support. A major consequence of acting out wrong and unproductive behavior (war crimes), is the cost of support from back home. The perceived loss of honor has a denigrating affect on our war making capacity as a nation. This truth remains not only when we are responsible for war crimes, but also when our allies are found responsible for war crimes.

Who can forget the sight of a South Vietnamese government official, the national chief of police, summarily executing a Viet Cong adversary in the streets of Saigon during the Tet '68? As the kneeling insurgent faces the camera, he gets a bullet in his brain from the chief's pistol at point blank range. News of events like this was spread very efficiently by word of mouth. Americans back home did not need news media coverage; letters and the stories of returning veterans were sufficient. The word of similar events routinely spread rapidly among the South Vietnamese people, as well, and helped to deprive the government of popular support.

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6. War crimes are not in our self-interest. Killing an Enemy Prisoner of War (EPW), for example, may deprive our forces of valuable intelligence information—"dead men tell no tales" and tortured men provide questionable information. In the context of American Criminal law, we have learned that a forced or involuntary confession or admission tends to be unreliable, therefore, the forced interrogation of an EPW provides information of little military value. Followed logically, information gained through torture is even less reliable because an EPW has an additional incentive to speak falsely—patriotism. In the end, we comply with the law of war because it is in our self-interest to do so.

a. Contented prisoners are less likely to cause trouble, less likely to attempt escape, and more likely to provide information. They develop a vested interest in preserving the status quo. Toward the end of World War II, many German units went out of their way to surrender themselves, their weapons, and the ground they defended to American and other western units in order to avoid being captured by the Russians. If these Soldiers had believed that there was no hope of civilized treatment, they may well have fought on to the bitter end, inflicting many more casualties in the process.

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b. Our compliance with the law of war may beget reciprocal compliance from our adversaries. Still another good reason to comply with the law of war is the Golden Rule: "Do unto others as you would have others do unto you," and do not do unto others, lest they return it two-fold. The presence of a deterrent is a powerful motivator for those who might be tempted to violate the law of war. For example, few would accuse the Nazis of goodness, but at the western front in World War II, the Germans refrained from chemical or bacteriological warfare for fear that the Allies would retaliate in kind. Such retaliation would have been catastrophic to the Germans in view of Allied air superiority. Even today, we maintain certain weapons as a deterrent, while renouncing their use.

c. Problems in leadership arise when our adversaries are not complying with the law of war. Their noncompliance is sometimes viewed as a cause to do likewise but war crimes are not in our self-interest. It often appears that this lesson is harder for Soldiers to understand if not emphasized through leadership. They may ask "If they are abusing their EPW, why don't we retaliate in kind?" This is an example of a question that cannot be answered because it requires justification of a negative. As Soldiers, we do not "not do" things; we "do" things. The valid question is not "Why not abuse the EPW?" Rather it is "Why abuse the EPW?" As noted earlier, we gain nothing from abusing an EPW, but stand to lose everything.

d. War crimes interfere with the restoration of peace. Going beyond military necessity and inflicting unnecessary suffering interferes with the restoration of peace. Whenever passions are raised, rationality abates and solutions are obscured. Real chances for give-and-take evaporate as it becomes impossible for either side to give in the heated emotional atmosphere generated by atrocity. Emotionally and politically, neither faction can justify compromise. The conduct of Soldiers from western nations in World War II, not only inspired German military units to surrender rather than continue fighting, it helped create an atmosphere which contributed to the peaceful governing and reconstruction of areas under western control after the war.

e. War crimes impact adversely on allied and other foreign support. That impact could be the loss of a combat multiplier. For example, our British allies withdrew support for U.S. efforts in Vietnam in 1969. That had the tangible effect of terminating military assistance. The Army trackers in Vietnam were trained by the British at their jungle warfare school in Malaysia; the tracker dogs were purchased, fully trained from the British Army. By 1969, though, we were no longer able to send Soldiers to Malaysia for training or replace old or wounded dogs, because the Labor government of Prime Minister Wilson withdrew its support for U.S. efforts. Contributing to that decision were reports of war crimes. The decision resulted in the denigration of an important combat multiplier because of the lead-time required to organize our own tracker school at Fort Gordon.

f. Law of war compliance is essential to the maintenance of discipline. This is the single most important reason for compliance with the law of war. To be effective, Soldiers must be disciplined. The front-line combat mission is to close with and destroy the enemy by means of fire and maneuver to capture or kill him. Soldiers do that—capture and kill people. They have power over human life. Proper exercise of that power requires enormous discipline, real discipline—not merely the threat of punitive sanction. Soldiers require real discipline, deeply ingrained, the kind we teach, the kind instilled through leaders that lead by example. Discipline is a two-way street. “Indiscipline in general” begets “indiscipline in particular,” and “indiscipline in particular” begets “indiscipline in general.”

(1) Law of war violations are violations of order (rule violations). We are talking about human behavior. A Soldier's behavior is governed not just by the law, but by the orders of superiors, by rules, Standing Operating Procedure (SOP), and the like. As we all learn throughout childhood, rules are rules. Lawbreaking begets disobeying of orders and various other discipline problems. Nonresponsiveness to the law of war in a particular case begets unresponsiveness to orders and other rules in general. Once discipline starts to crack, the crack inevitably widens, and simple rules are ignored or disobeyed, rules like: "Change your socks periodically so that your feet don't rot;" or "take your malaria pills daily;" or "set up a listening post 100 meters out, stay awake, and report what you see;" or "maneuver right;" or simply "follow me." Indiscipline in particular leads to indiscipline in general. This produces dissension in the ranks and leads to failure in combat, an environment in which military discipline is an indispensable ingredient of success. Stated simply, noncompliance with basic rules and orders results in loss of discipline, which reduces the Soldier's—and the unit's combat effectiveness, which leads to death and failure in combat—our deaths, our failures.

(2) Another consideration is that indiscipline in general can lead to indiscipline in a particular case. Consider for a moment a unit that has been in continuous heavy contact, like a rifle company caught in the Battle of the Bulge in December 1944. Conditions—winter; heavy losses; a new commander; key Noncommissioned Officer (NCO) positions are vacant; morale is down as a general retreat ensues; word of the Malmedy murders has filtered through the ranks; Soldiers have lost friends in heavy combat. Such units in such situations are law of war violations waiting for a place to happen.

7. The law of war is the law of the United States. Soldiers are people. Not all respond to positive discipline and to leadership by example. Not every Soldier has a solid ethical foundation, a value system that is shaped and influenced by a good upbringing and positive leadership. For these few Soldiers, punitive sanctions are necessary. And, appropriate sanctions are available. Violators can and will be prosecuted.

a. Article VI of the U.S. Constitution provides that "this Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land."

b. The treaties in question here, the various Hague Rules and Geneva Conventions, codified the unwritten, or customary, law that has evolved over the years.

(1) Unlike the Hague Rules and Geneva Conventions, some treaties are prospective in their application, trying to set forth new rules to govern behavior. Generally speaking, treaties like that never get ratified by enough nations to make them effective. Moreover, interpretation questions still have to be resolved, directly or by analogy, to existing rules and practices, called customary international law.

(2) The more effective treaties, like the Hague Rules and Geneva Conventions, simply codified and organized customary international law. The signatories agree in writing to abide by the consensus that already exists in unwritten form, and sometimes expand upon the consensus—but only slightly.

(3) All of the signatories to the treaties are bound by the treaty provisions, only the signatories are bound. However, because the treaties reflect preexisting consensus, non-signatories are influenced to be bound. Everyone is influenced to be bound because of the bottom line we discussed earlier. That is, following the rules is practical and productive; not following the rules is not productive. As we have already seen, war crimes are not only wrong, they are illegal. In the recent conflict between the United Kingdom and Argentina over the Falkland Islands (the Malvinas), both sides applied the law of war even though Argentina was not a signatory to the Conventions. They followed the rules because it was in their self-interest to do so.

(4) The law of war applies not only to declared war, but also to other international armed conflicts, whether or not a state of war is declared. That makes sense, of course. As we have already seen, these simple rules of behavioral self-discipline contribute to our success.

(5) Authorized to do so by the Supreme Law of the Land, the U.S. Congress enacted the Uniform Code of Military Justice (UCMJ), which applies to (among others), members of the armed forces, persons serving with or accompanying the armed forces in the field in time of war (like a corporate technical representative), and EPWs in the custody of the United States. A general court-martial can try any person who, by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. A general court-martial can try anyone subject to the UCMJ for war crimes and UCMJ violations. And, as several veterans from World War II have discovered in recent years, there is no statute of limitations for war crimes.

PART B- The Hague Rules and Geneva Conventions.

1. General. Thus far, we have reviewed why we comply with the law of war, because we are responsible for training our Soldiers. This is not an insurmountable problem, because good Soldiers are the rule and bad Soldiers are the exception. Nearly all of our Soldiers want to do and will do the right thing. Nearly all of them want to be part of a disciplined, effective unit. All of them want to survive. However, your Soldiers may have come to your unit with some misconceptions based on war stories they have heard or movies they have seen. This may be a greater problem in Reserve and National Guard units than it is in active units, because the percentage of combat veterans tends to be greater in Reserve and National Guard units. You may have to undo some prior, informal training. In combat, our Soldiers do what they have been trained and disciplined to do.

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For example, many of our Soldiers have been taught that the law of war prohibits firing a .50-caliber machine gun at personnel. That is wrong. The law of war does not prohibit the use of .50-caliber or other large caliber weapons against personnel. It is true that many Soldiers have been taught otherwise, and because a supposed rule like that does not make sense, it has left these Soldiers with a bad feeling about the law of war in general, with a feeling that it ties our hands behind our backs and gets in the way of mission accomplishment. The Office of The Judge Advocate General of the Army recently attempted to discover how this misconception about large caliber weapons made its way into law of war instruction. It appears that the confusion arose from application of the principle of war, economy of force, to the employment of large caliber weapons. Application of the economy of force principle to the use of the .50-caliber machine gun results in the conclusion that it is usually wasteful to employ such weapons against people. This is a weapon intended for bigger targets. Additionally, such wasteful use of the weapon can give away its position in our deployment. Thus, we can see that rules of tactics, not rules of law, dictate the use of the .50-caliber machine gun.

2. Principles Underlying the Hague Rules and Geneva Conventions. Three principles underlie the Hague Rules and Geneva Conventions. These principles apply to any and every wartime situation, and, properly applied, they will lead you to the correct result—both tactically and legally. These principles form an analytical framework that is as easy to apply as reading a MAP. This framework for decision is not lengthy or cumbersome; it is not unnatural or artificial. It is entirely consistent with the principles of war, and it not only does not conflict with sound strategic and tactical principles, it complements them. The three principles that

underlie the Hague Rules and Geneva Convention can be easily remembered by using the acronym MAP, which is outlined below:

a. M – Military Necessity. The principle of military necessity justifies those measures not prohibited by international law that are indispensable for securing the complete submission of the enemy as soon as possible. The first question, thus, becomes: What is prohibited? Some things are always prohibited. Some things are not prohibited. Others are prohibited "except when."

(1) Always prohibited; for example, taking and killing a civilian hostage is always prohibited. Torturing Prisoners of War (POWs) is always prohibited.

(2) Never prohibited; for example, shooting an armed adversary who is trying to shoot you in a firefight is not prohibited.

(3) Prohibited "except when"; for example, firing on a hospital is usually prohibited; however, if you are taking sniper fire from the hospital, this protected place loses its protected status. A protected place loses its protected status when it is used for a military purpose. It may be attacked, with reservations (the second and third principles).

As an example, during the Grenada conflict, U.S. forces took fire from a hospital; they responded tactfully and skillfully and neutralized the threat which they were authorized to due under the principle of military necessity, while complying with the second and third principles, Avoidance of unnecessary suffering, and proportionality.

b. A – Avoidance of Unnecessary Suffering. The law of war does not preclude the infliction of any suffering. We have the right to subdue our adversary, which may involve killing or wounding him. This second underlying principle forbids the employment of arms, projectiles, material, or activities calculated to cause unnecessary suffering.

(1) Prohibited weapons. Prohibited outright are things like punji stakes smeared with excrement (plain punji stakes are acceptable), poison, dum dum bullets, and the like.

(2) Not prohibited weapons. Not prohibited outright are weapons such as napalm, flame-throwers, and nuclear weapons.

(3) Reconciliation. Why does the law prohibit dum dum bullets, while allowing nuclear weapons? The treaties reflect consensus; they are codifications of customary law. No consensus equals no effective treaty, and consensus is missing on the control of nuclear weapons. Moreover, weapons like napalm and nuclear weapons are not calculated to cause unnecessary suffering. They do not have as a primary purpose the causing of suffering. Rather, they are intended to accomplish the specific military objective of neutralizing a suitable target. A flame-thrower can neutralize a bunker, when no other weapon will do, by eliminating the air supply (oxygen needed to support life). A nuclear weapon is particularly effective against a well-prepared hardened target.

(4) NBC weaponry. There are a wide variety of potential weapons of the chemical and biological variety.

I. Poison has been outlawed for years. Not only is it treacherous, it is also impossible to control.

II. Bacteriological weapons are unlawful and we have not reserved the right to use such weapons in retaliation. Biological weapons simply cannot be controlled.

III. Lethal gases were originally outlawed by the 1925 Geneva Gas Protocol, but the United States reserved the right to use such weapons against an adversary who used them first. However, under the Chemical Weapons Convention of 1993, all use of lethal gases, as well as all other chemical weapons, has been completely outlawed. Deterrent use is likewise outlawed.

IV. Chemical herbicides and riot control agents are not prohibited. They are different from "incapacitating chemical agents" in that they produce, in all but the most unusual circumstances, merely transient effects that disappear within minutes after exposure to the agent has terminated.

i. Herbicides. As a matter of national police, the U.S. has renounced the first use of herbicides in war except, under regulations applicable to their domestic use, for control of vegetation within or around the defensive perimeters of U.S. bases or installations.

ii. Riot control agents. Use of riot control agents in war have also been outlawed by the Chemical Weapons Convention of 1993. However, the U.S. has interpreted this ban on use in war as being limited to offensive operations, only. As a result, U.S. policy is to allow use of riot control agents in defensive military modes to save lives, such as in riot control situations in areas under direct and distinct U.S. control, to include controlling rioting EPW. In situations in which civilians are used to mask or screen enemy attacks, and civilian casualties can thereby be reduced or avoided. Or in rescue missions in remote or isolated areas, of downed aircrews and passengers, and escaping prisoners. Also in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary organizations.

iii. Smoke and incendiaries. The use of smoke and incendiaries is not unlawful.

(5) Weapons modifications. Weapons issued to U.S. forces are in compliance with the law of war. Modifications, however, may make them unlawful. For example, turning a bullet into a dum dum bullet by filing its head (to make it implode on impact), enhances its potential for suffering. This alteration is made for the specific purpose of increasing the victim's suffering. As usual, this law of war violation is not only wrong (because it causes unnecessary suffering) and unlawful (because the law specifically prohibits it), it is also stupid. Dumdumming a bullet adversely affects its aerodynamics. Stated simply, it will no longer fly straight.

c. P – Proportionality. Even lawful weaponry may be inappropriate in certain situations. The use of napalm or a nuclear weapon would not be appropriated to use in situations like the hospital in Grenada where U.S. Soldiers were receiving fire. The use of Napalm would cause unnecessary suffering and the use of a nuclear weapon would be disproportionate to the target. PROPORTIONALITY dictates that the loss of life and damage to property must not be out of proportion to the military advantage to be gained. To eliminate the threat by devastating the hospital would be inappropriate, based on the fact that other noncombatants are receiving medical treatment at that hospital. The military response against the combatant who staged in the hospital should remember and try to save as much of the hospital as possible, injuring as few patients and staff as possible, while accomplishing the mission. Remember, hospitals are useful for people who need medical care, whether our own forces, EPWs, or civilians.

The Grenada hospital example illustrates all three principles at work. If our only consideration is military necessity, unnecessary suffering and damage may result. If we look only at avoiding unnecessary suffering, the

unit may fail in its mission. The solution is to select tactics and weaponry that get the job done with as little damage and suffering as possible (Proportionality).

We are not being asked to fight with our hands tied behind our backs. We are being asked to have some perspective and to use common sense. The United States Military responsibilities extend beyond the immediate firefight. It was a lack of such perspective that cost General Santa Anna the northern portion of the Mexican Empire and changed the course of North American history.

Proportionality as a principle of tactical morality is inextricably intertwined with one of the principles of war. Which one? ECONOMY OF FORCE. Economy of force dictates that assets be employed judiciously to achieve victory with minimum loss of life and resources. Both economy of force, requiring efficient use of resources, and proportionality, requiring justifiable use of resources, take us to the same place—you do not use a sledgehammer to kill a fly.

3. Targets.

a. Protected places. A hospital is one of those places, under customary law and the Conventions, known and treated as protected places.

(1) The rule. All necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, science, or charitable purposes; historic monuments, hospitals, and places where the sick and wounded are collected, provided that the place is not, at the time, being used for military purposes.

(2) Besieged duty. The besieged have a duty to indicate the presence of such places by distinctive and visible signs, which are notified to their adversary beforehand.

Example. Was that hospital in Grenada a protected place? A: Yes. Q: If we were taking sniper fire from the hospital, does the principle of military necessity permit us to neutralize the threat? A: Yes. Q: Can we attack a hospital without reservation? A: No, we can attack it only if it is being used for a military purpose. Q: Can we attack it if it is a place where a sniper could be located, or a place where a headquarters or observation post could be located? A: No, there must be a reasonable belief that the protected place actually is being (not could be) used for a military purpose. Q: Can we blast away with nuclear weapons? A: No, the principles of avoidance of unnecessary suffering and proportionality dictate that we neutralize the threat with as little loss as possible to noncombatants and to the future use of the hospital.

(3) The Hague Convention does not provide absolute protection of a protected place, and U.S. military forces and other military forces of another country whether they be allies or combatants retain the right to attack a protected place. As mentioned earlier, a building or facility that falls under one of the previously mentioned protected places is protected until its right to protection is forfeited by its actual use for a military purpose.

(4) Balancing military necessity with avoidance of unnecessary suffering. Once we establish that the protected place can be attacked, we balance the necessity with the need to avoid unnecessary suffering (and, of course, the practical need to preserve the place because of its importance and to neutralize it as efficiently and effectively as possible). The result is proportionality.

(5) Perspective. It is easy for Soldiers to understand why a hospital is a protected place, but not as easy to understand why churches and places of scientific, cultural, and historic significance must be preserved. The problem is simply one of perspective. Civilian support for or acquiescence in our presence is important. In

particular, our rear echelon mission of controlling civilian populations is eased if we have taken care of places of importance to the people.

(6) Concluding the example. The Grenada hospital was attacked with a surgical air strike because that section of the hospital was separate from other parts of it. Some of the hospital was preserved. Only one bomb was used, released from low altitude. There were several casualties among staff and patients. The target was neutralized.

b. Lawful targets. Some objects, then, are usually protected under the law of war. The assumption is that they are not lawful targets. Engaging them is the exception. What targets are assumed to be lawful?

(1) Combatants. Lawful targets include combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict is a combatant. (Lawful combatants do receive law of war protection; however, others may be treated as criminals under domestic law.)

(2) Military objectives. Lawful targets include military objectives. A military objective is something that by its use, nature, location, or purpose makes an effective contribution to military action, and whose total or partial destruction, capture, or neutralization offers a definite military advantage. Examples:

- I. Factories producing munitions or military supplies.
- II. Military camps.
- III. Warehouses storing munitions and military supplies.
- IV. Ports and railroads being used for the transport of military supplies.
- V. Other places devoted to the support of military operations or the accommodation of troops.

(3) Defended places examples.

- I. Forts and fortified places.
- II. A city or town surrounded by detached defensive positions. The city or town is considered jointly with such defensive positions as an indivisible whole.
- III. A place occupied by a combatant military force through which such a force is passing.
CAVEAT: The occupation of a place solely by a medical unit does not make it a defended place.
- IV. General CAVEAT. Civilians and civilian property may not be the sole object of a military attack.
- V. MAP. While achieving the military objective (Mmilitary necessity), care must be taken to avoid or limit incidental damage (Avoidance of unnecessary suffering) to surrounding people and property. Incidental damage is unavoidable and unplanned damage. Incidental damage must not be disproportionate to the expected gain (Proportionality).

(4) Undefended places that do not qualify as military objectives. The military objectives previously set forth above, may be attacked whether or not they are defended. Other places may be attacked if they are

"defended places." There are few places known as "undefended places" that may not be attacked if certain criteria are met. The criteria for an undefended place are very specific (all of the criteria must be met):

- I. An inhabited area.
- II. Open for occupation.
- III. At or in the zone of contact.
- IV. Capable of immediate occupation.
- V. A place that has been declared open.
- VI. A place that has no enemy forces, no resistance by the civilian population, no hostile acts, and no acts in support of the enemy military.

Historically, undefended places have been sometimes called "open cities." The terms are synonymous.

4. Rules of Engagement. Rules of engagement are to the law of war as Army regulations are to statutes of Congress. They are corollaries to the law of war. Q: If Congress has said that we cannot do something, by passing a law, can the Secretary of the Army lawfully tell us that we can do it? A: No, the statute takes precedence. Q: If Congress has said that we can do something, or by inaction, has not said that we cannot do it, can the Secretary of the Army, nevertheless, order that we cannot do it? A: Yes, generally speaking, the Secretary can impose rules that are more restrictive (notable exceptions include abrogation of individual constitutional rights, for example).

a. MAP. Rules of engagement work the same way. They can be more restrictive than the law of war, but they cannot permit us to do what the law of war forbids. They are the commander's application of the law's underlying principles: Mmilitary necessity, Avoidance of unnecessary suffering, Proportionality. Rules of engagement are more detailed and specific than the applicable law of war, and may apply to designated areas, units, time periods, weapons used, or situations.

b. Commander's perspective. By issuing rules of engagement, the commander extends his perspective to the farthest reaches of the battlefield. Higher level commanders have a wide variety of responsibilities that we do not always appreciate at small unit level. Examples:

(1) Executive Order (EO) 11850. By issuing EO 11850, the President of the United States has limited our first use of riot control agents and herbicides.

(2) A commander might order that certain classes of weapons not be employed in certain areas; for example, a division commander might require that subordinate units refrain from utilizing indirect fire support in a built up area or refrain from using such weapons until obtaining specific approval.

(3) A commander might wish to capture a hospital intact even if it is being used for military purposes, and limit the types of weapons and tactics that might be employed to neutralize the threat.

(4) Rules might be SOP, or ad hoc, applied only on a limited basis for a short-term.

5. Developing the rules. It is not the wish of any commander to impose rules that are, or seem to be, unreasonable to his Soldiers. Accordingly, he will first consult the intelligence estimate to determine the scope

of current and expected enemy activity in his area of operations; for example, if the enemy is entrenched in a built-up area, the commander is not likely to impose a rule of engagement against using indirect fire. Similarly, if a rule proves to be unworkable, the commander may withdraw it.

6. Avoidance of isolation. Compliance with the rules of engagement requires more than just knowing and understanding them. The commander's perspective does not necessarily mirror the Soldier's perspective. A Soldier who does not understand the reason behind a rule may feel that he has to fight with one hand tied behind his back. It is easy for Soldiers to develop feelings of isolation and paranoia in combat. This is a special problem when operations are conducted by small units. A Soldier can get the feeling that he is all alone out there, that it is him against the world. A small group can develop the feeling that it is them against the world, and that can lead, ineluctably, to the group dynamic that the end justifies the means. It is essential, therefore, that we as leaders keep our Soldiers informed about their place in the big picture, about the relationship to larger units.

PART C - Protecting People

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1. General. Rules of engagement can be designed to protect people more than the law protects them. The law of war already provides significant protection. We have already noted some of the things from which people are protected. All people everywhere are entitled to protection from prohibited weapons, things calculated to cause unnecessary suffering. Some people are entitled to additional protection. Their entitlement to treatment depends on who they are and what they do.

Earlier, we reviewed the three principles that underlie the Hague Rules and Geneva Conventions: Mmilitary necessity, Avoidance of unnecessary suffering, and Proportionality (MAP). The same central theme that underlies the MAP analytical framework—that is, do what is right and reasonable under the circumstances—produces the categories of people and their entitlement to treatment.

2. Persons Protected.

a. Combatants are protected against the use of prohibited weapons.

b. Noncombatants are protected against the use of prohibited weapons and have further entitlements because they are no longer a threat to you—or they never were. Thus, there is no military necessity to harm them, and harming them would cause unnecessary suffering. Protected noncombatants include:

- (1) EPWs.
- (2) Civilians.
- (3) Medical personnel.
- (4) Sick and wounded who have ceased fighting.
- (5) Retained personnel—that is, captured chaplains and medical personnel.

c. Prisoners of War (POWs). POWs have rights. It is here that the golden rule is well illustrated, because we might take an EPW, and have to process and hold them, and because we might become a POW.

(1) Required disclosures: When captured by the enemy, an EPW is only required to give his name, rank, service number, and date of birth. Note that this is a two-way street. A capturing power is entitled to this information, and to no more information.

(2) Geneva Conventions identification card. The Conventions also provided for an identification card. Most countries issue such cards to members of their armed forces. A POW must, on demand, show this card to his captor. The captor does not have the right to keep the card, except briefly for data collection purposes. The POW has the right to retain the card. Q: Have you ever tried to use your Geneva Conventions ID card to get into the PX while you were in civilian attire? A: Yes. The standard Armed Forces Identification Card is also the Geneva Conventions ID card for U.S. service members.

(3) Who qualify as POWs. POWs include:

I. Members of the regular armed forces of a party to the conflict, including militia and volunteer corps that are part of the armed forces. For the United States that includes Regular Army, Reservists, and National Guardsmen.

II. Members of other militia, volunteer corps, and organized resistance movements, provided that the organizations meet the following criteria:

- i. The organization has a commander responsible for subordinates.
- ii. The organization members have a fixed distinctive emblem visible at a distance.
- iii. The members carry arms openly.
- iv. The organization conducts operations in accordance with the law of war.

Persons accompanying the armed forces such as technical advisers and representatives, and war correspondents if the representatives, advisers, and

III. correspondents have authorization from the forces they accompany. They should be provided with Geneva Convention identification cards.

IV. Merchant Marine and civilian aircraft crews of parties to the conflict.

V. Inhabitants of unoccupied territory who spontaneously take up arms openly to resist invaders provided that they respect the laws of war.

(4) Determination of status. We do not decide who is or who is not entitled to EPW status. That determination is made at a much higher level by a competent tribunal. At our level, we treat all captives with respect and decency, consistent with the central theme of the law of war. A combatant who qualifies for EPW treatment under c above, but who deliberately conceals his status, loses protection. If, for example, you dress in an enemy uniform in order to slip through his lines to reconnoiter, and you are captured, you may be treated as a spy; also remember that someone usually entitled to EPW status can give up that status.

(5) EPW property rights. An EPW can keep all personal effects.

I. Not retainable. Of course, retainable personal effects do not include weapons or munitions, military documents (except for the Geneva Conventions identifications card), or most military equipment.

II. Retainable. Personal effects that an EPW may keep include wedding rings, family photographs, and other items of sentimental value. Rank insignia and decorations. Clothing. Mess gear, protective mask, helmet, and other similar items issued solely for personal use and protection.

As with other rules, these are things we do, in part, for our own benefit. Absent some kind of rules concerning the disposition of EPW property, there is potential for indiscipline in our own ranks. And, once again, compliance with these rules is not only right, it clearly benefits the captor. A happy EPW is a good EPW. By giving the EPW a vested interest in continuing his present circumstances, we reduce the incentive to escape or cause trouble, and increase the incentive to provide information.

(6) EPW treatment rights. EPWs are evacuated from the battle area as swiftly, safely, and humanely as possible. They must not be exposed unnecessarily to fire. Among other things, EPWs are entitled to:

I. Adequate food, clothing, and shelter.

II. Adequate exercise, sanitation, and medical care.

III. Mail service.

IV. Discipline. EPWs are subject to the laws of the captor and tried in military courts according to procedures used for Soldiers of the captor.

V. Work.

i. Officers. An officer is not required to work, though an individual officer may waive that restriction.

ii. An NCO may be required to do supervisory work, but may waive that restriction and do more.

iii. Recommendation. Generally speaking, a captured U.S. officer or NCO should, in order to maintain military discipline, get as involved in work as they would under normal circumstances. They should do what the Soldiers are accustomed to having them doing and try not to deviate from normal superior-subordinate relationships.

iv. Enlisted personnel. Soldiers may be required to perform nonmilitary work, such as building, maintaining, administering the EPW camp, farming, public works, and public utility services. Also, in industries involving raw materials and manufacturing, except for metallurgical, chemical, or machinery industries, transporting and handling of nonmilitary supplies, domestic services and commercial business, arts, and crafts.

(7) Retained persons. Medical personnel and chaplains are further distinguished when taken captive. Under the law of war, they are called retained persons, and are required to perform only the duties of their

professions. As usual, there is a spillover benefit to the captor from following the rules. In this context, the captor has to provide medical and spiritual services anyway; it is preferable to utilize retained personnel to carry as much of that load as possible.

(8) Reciprocity. Unfortunately, in recent years, we have not always received reciprocity in EPW treatment. However, the absence of reciprocity does not justify letting down in our own treatment of EPW. Giving proper treatment is always right and reasonable under the circumstances. By doing what is right, we do not affect adversely the treatment our own Soldiers receive, and we may induce better treatment. On the other hand, improper treatment of EPW by us may well increase the infliction of suffering by the other side.

Here, it is important to remember that we are going to be considered responsible for the behavior of our allies. Recall that scene in which South Vietnam's national chief of police summarily executes a Viet Cong soldier. The victim may well not have been entitled to EPW status (absence of distinctive insignia, lack of adherence to the law of war), but he was not entitled to summary execution. Every captive must be treated humanely and moved swiftly to the rear.

It is too easy to focus on what the enemy is doing and find in his misbehavior justification for our own misbehavior. That is the wrong focus. We must always focus on our own actions and consider not only whether it is right or wrong, but also whether it is beneficial or not. The question becomes, not, "Why not do it," but rather, "Why do it?" Not, "They are mutilating bodies, why shouldn't we do likewise?" But, "Why should we mutilate bodies?" If we cannot justify what we do, there is no reason to do it. There is no reason to mutilate bodies, as nothing positive will be gained from it, and much may be lost; for example, the enemy may fight more fiercely or with greater resolve, or may not surrender, or may harm prisoners.

d. Medical Personnel, Vehicles, and Sites. Medics are not a threat to us. They are noncombatants and entitled to appropriate protection. By making medical personnel, vehicles, and sites off limits to military attacks, we not only reduce the suffering of war, we enhance the morale of our own Soldiers. Reciprocal treatment by the enemy helps to ensure that our own medical personnel, vehicles, and sites will also be protected from aggressive military actions. Our morale is enhanced, and our combat power multiplied, when we believe that our wounds will be treated, that we have a chance to survive the battle.

Reciprocity is not only a motivation for treating medical people and things differently, it is also a motivation for avoiding treacherous use of medical symbols. We may not hide a combat purpose behind the medical symbol; for example, we may not move combat troops from place to place in a marked medical vehicle. That would be holding the enemy's law of war compliance against him. The inevitable result is reduced compliance, with the rest of our medical personnel, vehicles, and sites fair game for attack. However, it is permissible for the commander to order that the red crosses on the medical vans be camouflaged in order to help mask the movement of the unit, but, by concealing the red crosses, we are depriving ourselves of law of war protection. In essence, the unit is not only not hiding behind the protective symbol, it is voluntarily giving up the protected status of the vehicles.

Just as we may not hide a combat purpose behind the medical symbols, we may not do anything else that holds the enemy's law of war compliance against him; for example, we may not pretend to surrender and then shoot the enemy as he comes to capture us. The short-term advantage is greatly outweighed by the long-term disadvantage. In the long run, law of war compliance is reduced across the board, with resulting greater suffering. The consequences of misusing a red cross, a flag of truce, or a signal of surrender include depriving the rest of our protected people and things of protection. Medical vehicles are attacked, surrenders are refused, prisoners killed, and the enemy fights with greater resolve because of our treachery.

e. Parachutists. The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon. If crewmen are parachuting from disabled aircraft, their weapon of choice (the aircraft) has been eliminated. On the other hand, a paratrooper is not helpless. They are combatants and, thus, proper targets, even while descending from an aircraft. That makes sense, because parachuting into battle ought to receive the same treatment as walking or riding into battle. There are practical problems. Volley fire is more successful than aimed fire in engaging descending parachutists because of depth perception problems. It is not necessary—indeed, it is not possible—to differentiate among aircrews and combatants when they descend from the aircraft at the same time. Moreover, if crewmen are individually armed, have orders to use force to evade capture, and fight as foot Soldiers after they land, they are combatants. It is permissible to engage parachuting aircrews if the enemy's previous behavior clearly demonstrates that the crewmen will continue to fight during descent or after landing. This example illustrates the use of the MAP analysis.

f. Civilians. Civilians are the classic noncombatants, and civilians who become captives are entitled to essentially the same treatment as EPWs. Q: What if the enemy is advancing behind a screen of civilians, firing at you from behind the unwilling shield? Can you fire on the enemy? A: Yes. Try to work your way around it. Do your best not to kill the civilians, but fire on the enemy if you must. The enemy is responsible for the civilian casualties.

The basic law is to treat all captives humanely. It doesn't matter what group they will finally end up in, when your unit takes control of them, you have the responsibility to protect them and provide for them. There is no need for your unit to separate the group into prisoners, medical personnel, civilians, etc. All your unit needs to do is to treat them well, keep operational security and protection over them, and move them swiftly to the rear areas. Not only is this important tactically (it frees up your unit and gets the prisoners back to where they can be properly treated and tactical intelligence gathered), but this action also fulfills law of war requirements. We have personnel trained to determine the status of captives and detainees, your unit does not. So treat them all humanely, and get them out of the battlefield.

PART D- Applying the Law of War.

1. Leadership is Critical. At those ever few times in life when push comes to shove, when the bottom line is right here, right now, you react accordingly to your essence. At such times it matters how you were reared, who your role models and heroes were, your teachers and coaches, and your commanders. Whose voice do you hear, whose face do you see in your mind's eye when you are all alone and in need of advice? It is at such times that someone in your past or present leads you by example. It is no different for your Soldiers, and you can be that person in the past or present who leads by example. That is how we lead our Soldiers when we lead them best. Leadership by example does not have a toggle switch that we can turn on and off. It is everything we say and do that teaches our Soldiers who we are, what we are about, who they are, and what we want them to be about. Leadership by example includes everything from not issuing unlawful orders, rejecting unlawful orders, and investigating violations, to not referring to the adversary by radical slurs, not wearing to the battalion picnic a T-shirt that says "kill them all, let God sort them out," and not telling someone to falsify a maintenance report.

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Leadership also involves training. We do as we are trained to do, but you and your Soldiers will never be asked to conduct a Geneva Convention patrol or dig a law of war position. Yet, training is easier to do than you might think. First, find out where the training is weak. Test your Soldiers. Ask some realistic questions based upon some of the readily available instruction aids. Consult your Staff Judge Advocate (SJA) office for support. But, remember that it is training. The commander is responsible for law of war training. Incorporate training situations into field training exercises.

2. Actions in Combat. In actual combat, training continues, you can never perform an act in violation of the law of war, or issue an order that is in violation of the law of war.

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3. Dealing with an unlawful order. The following guidelines have been developed to assist you in responding to and what to do if you receive an unlawful order that goes against the law of war:

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- a. Clarify the order, stating what you believe to be a lawful order.
- b. If your superior remains adamant on issuing an illegal order, tell him that you disagree with the order and specify what you mean.
- c. Give the superior a chance to withdraw the order.
- d. Use moral persuasion to convince the superior to change the order.
- e. Ask a senior superior to confirm the order.
- f. If all this fails, inform the person issuing the order that his actions will be reported to the next higher chain of command.
- g. In any event, do not follow the order. It works; there were soldiers at My Lai who refused to participate in the executions.

4. Reporting.

- a. Unlawful orders. If the order is not withdrawn, or if someone carries it out, then you must report it, through the chain of command. If that does not work, or will not work, report to an inspector general, the provost marshal, judge advocate, or a chaplain.
- b. Violations. If one of your Soldiers or anyone reports an incident that may be a law of war violation, you must take action. Conduct a preliminary investigation and, based upon the results, either report the incident up the chain of command, or correct the situation at your level and report it through your chain of command. You can take corrective action in many cases; for example, you can stop the alteration of ammunition; relieve a subordinate who has issued an illegal order; return property stolen from an EPW, etc. Notwithstanding the corrective action, however, the circumstances must still be reported through the higher chain of command or higher authority.
- c. Reasons for reporting. Reporting prevents cover-ups. It also documents the facts, including your actions, and thus establishes the database on which decisions and inquiries will be predicated, and which protects you. Most importantly, reporting helps to establish an atmosphere that discourages indiscipline and impropriety. We must be disciplined if we are to be successful.

5. Planning. It is best, of course, to avoid the problem. Leadership is one way. Planning is another. Anticipate law of war situations just as you anticipate ammunition expenditures and the need for re-supply or casualties and the need for medical evacuation; for example, an infantry commander who anticipates many enemy prisoners should plan to call on you for military police support. If operating in a built up area, the commander should take great care with his fire support plan. Every leader must ensure that orders are issued in unmistakable language. Planning avoids problems.

6. Sanctions. The law of war lays out what can and will happen to you or one of your Soldiers for committing a war crime, or to the person issuing orders that violate the law of war. They can be tried as a war criminal.
7. War crime. A war crime is any violation of the law of war by anybody, military or civilian. Some crimes, called grave breaches, are more serious than others, called simple breaches.
8. Forum. If trial is by the United States, it would be trial by court-martial. The United States and other signatories to the Conventions are committed to the prosecution of anyone who commits a grave breach of the law of war. The United States may prosecute anyone whose actions violate the Uniform Code of Military Justice (UCMJ), whether the conduct in question is a grave breach of the law of war, a simple breach of the law of war, or something else not technically a war crime. (Some battle area violations of the UCMJ are not war crimes; for example, the rape of a civilian national of an ally is not, per se, a war crime. It is, of course, a violation of the UCMJ.)
9. Grave breaches. A grave breach of the law of war is a serious act committed against a person or property protected by the law of war including:
- a. Willful killing, torture, or inhumane treatment of the wounded and sick, EPWs, and civilians including biological experiments.
 - b. Willfully causing great suffering or serious injury to the body or the health of the wounded and sick, EPWs, and civilians.
 - c. Extensive destruction and appropriation of property of the wounded and sick or of civilians, not justified by military necessity and carried out wantonly and unlawfully.
 - d. Compelling an EPW or civilian to serve in the captor's armed forces.
 - e. Willfully depriving an EPW or civilian of the right to a fair and regular trial.
 - f. Unlawful deportation, transfer, or confinement of a civilian.
 - g. Taking civilian hostages.
10. Simple breaches. The Convention's signatories are committed to suppressing simple breaches of the law of war. Representative simple breaches include:
- a. Using prohibited arms or ammunition.
 - b. Maltreatment of dead bodies.
 - c. Misuse of the Red Cross emblem.
 - d. Pillage or purposeless destruction.
 - e. Poisoning of wells or streams.
 - f. Firing on localities that are undefended and without military significance.
 - g. Improper use of protected places for military purposes.

h. Use of civilian clothes by Soldiers to conceal their military characters.

i. Feigning surrender.

j. Compelling EPWs and civilians to perform prohibited labor.

11. Command responsibility. A commander may sometimes be responsible for acts of war committed by subordinates. A commander, or other leader, is responsible for a war crime:

When he personally commits it, or when the crime was committed pursuant to his order, or whenever he has actual knowledge—or whenever he should have knowledge through reports received or by the normal means—that a subordinate committed a war crime and necessary and reasonable steps were not made by the commander or leader to ensure compliance with the law of war or to punish violators. The "should have known" component assumes a widespread condition, a pattern of abuse over a period of time. In such a case, the commander or other leader is presumed either to have had knowledge or to have abandoned the responsibilities of leadership or command.

12. Uniform Code of Military Justice. The UCMJ fully enforces the law of war.

Specific offenses. Some of the potential offenses under the UCMJ are:

a. Disobeying a lawful order (Articles 90, 91, and 92).

b. Wrongful behavior concerning captured or abandoned property (Articles 103 and 109).

c. Misconduct as a POW (Article 105).

d. Crimes such as rape and murder (Articles 118 through 130).

e. Principals. A leader becomes a principal whenever—

I. He orders the offense.

II. His failure in the performance of his duties constitutes a willful and wanton disregard of the probable consequences.

f. Lesser Included Offenses (LIO). The UCMJ also recognizes lesser offenses.

I. Article 92. When a commander's actions/inactions are not bad enough to make him liable as a principle, he may still be guilty of something. Thus, where orders exist to report promptly a suspected war crime to higher headquarters (as in Korea and Vietnam), a commander who somehow escapes liability as a principal, may still be guilty of disobeying an order or dereliction of duty.

II. Articles 78 and 134. Accessory and misprision. Failure to report may rise to the level of misprision of a serious offense (Article 134) or worse, accessory after the fact (Article 78). Cover-up is criminal. Solicitation. Commander or not, a person's conduct may, while falling short of making him liable as a principal, nevertheless subject him to punishment for solicitation of a crime, or requesting a crime.

13. Staff officer responsibility. Few staff officers have been convicted under the law of war for offenses committed within their commands, because the commander is responsible for the action/inaction of his staff. Where the staff officer has been delegated sufficient authority to control certain duties of the commander, that is, where there has been a virtual sharing of the command with the accused staff officer, the staff officer becomes criminally responsible. Also, where the staff officer effectively countermands his superior's orders or intent, the staff officer is responsible. The doctrine of principles however, may well make the staff officer criminally liable for transmitting an unlawful order.

14. Defenses. Sometimes, the circumstances dictate whether a given behavior is illegal or criminal. When there are crimes alleged or suspected, there may be defenses. A defense acknowledges that the alleged behavior, in fact, occurred, but denies the criminal liability on the grounds that the behavior was legally justified.

a. Never a defense. Some justifications for behavior do not excuse criminal conduct.

(1) Municipal law. That an act was done in accordance with municipal law is not a defense of the act if it is in violation of the law of war. The fact that domestic law does not impose a sanction does not relieve you of responsibility.

(2) Official capacity. The fact that someone who committed a war crime was acting as a government official does not excuse the crime. Traditionally, a person acting in their official capacity was a mere instrument of the state. The act was that of the state, not the person. The World War II war crime tribunals declined to accept this as a defense. They did not even consider it in mitigation of the punishment.

b. Sometimes a defense.

(1) Obsolescence of the law. Thus far, war crimes tribunals have not recognized this assertion as a defense, but the World War II war crimes tribunals were at least willing to consider that the advancement of science might render obsolete or inapplicable a rule relating to the conduct of hostilities.

(2) Military necessity. This is a defense when the MAP analysis is conducted properly. However, to the extent that the term connotes the right to do anything that contributes to the winning of the war, it is not a defense.

(3) Self-defense. For example, it is a defense to murder, or assault with intent to commit or inflict grievous bodily harm, that the accused:

II. Actually and reasonably believed that death or grievous bodily harm was about to be inflicted on him.

III. Believed that the force he used was necessary to prevent that. (Killing an enemy in combat, consistent with the law of war, is justified. The doctrine of self-defense is not at issue in such a case.)

(4) Defense of another. Self-defense principles apply to the defense of another person, but you cannot use more force than that person was entitled to use under the circumstances.

(5) Mistake of fact. If the facts were what you believed them to be and (in most cases) that belief was reasonable, then you may be excused if you turn out to be mistaken.

(6) Duress. It is a defense to every offense except killing a person that you reasonably feared death or grievous bodily harm would be inflicted on you or another innocent person. This apprehension must continue throughout the act, and the defense assumes that there was no reasonable opportunity to avoid committing the act.

(7) The defense of obedience to superior orders. Alfred Lord Tennyson in his classic, "The Charge of the Light Brigade," reflected on the lot of the individual foot Soldier: "Theirs not to make reply; theirs not to reason why; theirs but to do or die." As long as there has been war and an organized military, subordinates have been duty bound to obey the orders of their superiors. The officer's commission expresses the special trust and confidence of the President of the United States in the officer and charges him to obey his superiors and his subordinates to obey him. The defense of obedience to superior orders has been recognized since the earliest days of our republic and had a prominent place in one of our earliest military treaties, Winthrop's Military Law and Precedents.

(8) History. Traditionally, the responsibility for war crimes in a *respondeat superior* situation was placed on the superior who gave the order, not the Soldier who followed it. The first legal authorities to suggest that, where the order is clearly illegal, *respondeat superior* is not a defense, were Germans. The doctrine that both superior and Soldier were responsible eventually became German Army doctrine. On the other hand, as recently as 1940, the U.S. Army field manual on the rules of land warfare expressed our doctrine that only the superior was responsible. Thereafter, U.S. doctrine changed. It changed well before our involvement in Southeast Asia. Nonetheless, the defense of obedience to superior orders was raised in the trial of First Lieutenant William Calley. First Lieutenant Calley was convicted of murder. So, while the defense is one of historic proportion, and one that exists today, it is not unlimited.

15. Current law.

Legal order. Obedience to superior orders is not a defense when the actions were performed pursuant to a legal superior order, but—

a. In a wanton manner, that is, with heedless disregard of the probable consequences of an act or omission, an indifference that death or grievous bodily harm is likely to result, or in a manner exceeding the scope of the authority.

b. Illegal order. Obedience to superior orders is not a defense when the actions were performed pursuant to an illegal superior order that the accused knew or reasonably should have known was illegal. An accused is not held responsible unless the illegality of the order is obvious, because Soldiers in wartime are trained to follow superiors' orders relatively automatically, and are not normally expected to question orders. Even if the plea is not accepted as a defense in a particular case, the fact of obedience may be considered in mitigation of the punishment.

c. Orders are presumed to be lawful.

16. The defense of reprisal. It may be a defense that the act in question was performed as a legitimate reprisal, unless it is behavior (like torturing an EPW) that is not permitted under the reprisal doctrine. This could be an important plea, because reprisal, by definition, is a law of war violation.

17. Reprisal.

- a. Defined. A reprisal is an act of retaliation in the form of conduct which would otherwise be unlawful, against enemy personnel or property, in response to law of war violations by the enemy, for the purpose of obtaining future compliance with the law of war; for example, when, in response to the enemy's intentional mistreatment of an EPW, we might employ a weapon, the use of which is normally unlawful.
- b. Priority of other remedies. Reprisal is a last resort and should not be used unless the safety of the troops requires immediate action or the person(s) who committed the offenses cannot be secured.
- c. Permissible, not mandatory. Even when appeals to the enemy for redress have failed, reprisal is a permissible, not a mandatory remedy. It is usually a wiser policy to simply continue abiding by the law of war. Opposing forces are more likely, in many cases, to be influenced by our steady adherence to the law of war, because, as we have seen, compliance with the law of war benefits all parties to the conflict.
- d. Limitations.
 - (1) Reprisal against civilians, EPWs, sick and wounded is prohibited.
 - (2) The decision to reprise may never be made by the individual Soldier, but only by the direct order of a commander who has made careful inquiry into the matter.
 - (3) The highest possible military authority should be consulted. Ill-considered, ill-informed action may later be deemed unjustified, and escalation may result.
- e. Proportionality. Proportionality is the key. While the act of reprisal need not be, and in some cases, may not be, the same as those committed by the enemy, it may be excessive or exceed the degree of violence committed by the enemy.

SUMMARY

Determine if the students have learned the material presented by soliciting student questions and explanations. Ask the students questions and correct misunderstandings.

Practical Exercise

- 1) Obedience to superior orders is not a defense when:
 - a) The order was obviously lawful.
 - b) The order was lawful but was carried out in a wanton manner.
 - c) The order was lawful and was carried out in a manner within the scope of the authority.
 - d) All of the above.
- 2) The use of a .50-caliber machine gun against attacking enemy personnel may violate:
 - a) the law of war.
 - b) the principle of "least active resistance."
 - c) the principle of war, economy of force.
 - d) all of the above.
- 3) The law of war principle of "avoidance of unnecessary suffering" prohibits:
 - a) the use of arms, projectiles, material, or activities calculated to cause unnecessary suffering.
 - b) any incidental injuries to noncombatants, even where unavoidable.
 - c) weapons such as napalm, whenever used in combat.
 - d) the use of any weapon which may result in the infliction of any suffering.
- 4) The most important practical reason to comply with the law of war is that:
 - a) compliance terminates foreign support for the war.
 - b) noncompliance results in favorable publicity.
 - c) compliance is essential to the maintenance of discipline.
 - d) compliance can result in criminal prosecution.
- 5) The use of chemical herbicides and riot control agents is:
 - a) always prohibited under the law of war as "incapacitating chemical agents."
 - b) essential to the maintenance of discipline.
 - c) allowed for retaliation-in-kind by the U.S.
 - d) never regulated under the law of war.
- 6) The principle of military necessity:
 - a) justifies any action taken to accomplish the mission.
 - b) justifies actions indispensable for securing the complete submission of the enemy as soon as possible without regard to avoidance of unnecessary suffering or proportionality.
 - c) justifies only those measures not prohibited by international law for securing the complete submission of the enemy.
 - d) justifies any measures necessary for securing the complete submission of the enemy as soon as possible.

- 7) The central theme underlying our compliance with the law of war is:
- a) the rules of war apply only if they do not cause inconvenience to the war effort.
 - b) we do whatever will inflict injury upon the enemy--combatants or noncombatants.
 - c) at all times, we do what is right and reasonable under the circumstances.
 - d) all of the above.
- 8) Which of the following is NOT considered a grave breach of the law of war?
- a) Misuse of the red cross emblem.
 - b) Wilfully causing great suffering or serious injury to the wounded and sick PW and civilians.
 - c) Willful killing, torture, or inhumane treatment of the wounded and sick EPW and civilian.
 - d) Taking civilian hostages.
9. Reporting a suspected violation of the law of war is required, even if you can take corrective action at your level, because:
- e) it negates respondeat superior, prevents coverup, and prevents investigation.
 - f) it creates coverups, protects the chain of command, and allows a "safe" investigation.
 - g) it negates respondeat superior, encourages a lack of discipline, and documents the facts.
 - h) it prevents coverup, encourages discipline, and documents the facts.
- 9) Which persons do not qualify for prisoner of war status?
- a) Members of the armed forces and the legislatures of a party to the conflict.
 - b) Members of militia and volunteer corps that are part of the armed forces or a party to the conflict.
 - c) Members of the regular armed forces of a party to the conflict.
 - d) b and c above.
- 10) An officer prisoner may work when:
- a) he waives his right to refrain from work.
 - b) paid the required amount.
 - c) ordered to be a superior officer of the opposing force.
 - d) there are no enlisted prisoners for work details.

ANSWER KEY AND FEEDBACK

| <u>Item</u> | <u>Correct Answer and Feedback</u> | |
|-------------|------------------------------------|--|
| 1. | D. | Current Law. (page 22) |
| 2 | C. | The Economy of Force, Principle. (page6) |
| 3. | A. | Avoidance of Unnecessary Suffering.. (page 8) |
| 4. | C. | Law of War compliance is essential to the maintenance of discipline (page 6) |
| 5. | D. | Chemical herbicides and riot control agents are not prohibited (page 9) |
| 6. | C. | Military Necessity (page 8) |
| 7. | C. | A central theme underlying compliance (page 3) |
| 8. | A. | Simple breaches (page 19) |
| 9. | D. | Reasons for reporting (page 18) |
| 10. | A | Who qualify as POW (page 14) |
| 11. | A. | Work (page 15) |